Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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ORIGINAL FILE

Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers	CC Docket No. 92-26

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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SUMMARY

Although the Commission has suggested some useful innovations in its Notice proposing modifications to its formal complaint procedures, other suggested changes would only create additional burdens for litigants and the Commission and, in some cases, would compromise the complaint process as a potentially effective remedy for injured ratepayers.

Since the most significant delays in the resolution of formal complaint proceedings occur after the completion of the pleading cycle and discovery, much of the procedural "tinkering" proposed in the Notice would not expedite complaint proceedings significantly. Moreover, some of the Commission's proposals actually would be injurious to the complaint process. Efforts to speed up the pleading cycle or discovery by lopping off a few days here and there from the procedural timetable would result only in incomplete, unresponsive pleadings and discovery, more requests for extensions and for leave to file amendments to incomplete pleadings and discovery, and thus greater burdens on the litigants and Commission staff and, in the end, more delay.

The proposals reducing the defendant's time to answer, requiring defendants to file summary judgment motions (prematurely) with their answers, imposing rigid scheduling, format and other requirements on briefs requested by Commission staff, eliminating "superfluous" replies and changing the discovery timetable are all examples of "quick fixes" of procedures that are not really broken. Some of these

modifications would also boomerang, aggravating the perceived conditions they were intended to improve.

Even worse, certain of the proposed modifications, especially with regard to discovery procedures, would make the complaint process less fair. Some would impose extra burdens on ratepayers and others seeking accounting and other data from dominant carriers -- data that has become increasingly shielded from public view under price caps and other deregulatory initiatives. Given the Commission's reliance on the complaint process, in so many different contexts, as a substitute for more direct regulation of dominant carrier rates and practices, any further diminution in the effectiveness or fairness of the complaint remedy would constitute an abdication of the entire range of the Commission's statutory responsibilities, not merely its authority under Sections 206-09 of the Communications Act. Accordingly, the proposals to shorten discovery deadlines, or otherwise reduce opportunities to obtain discovery, should all be rejected so as not to tip the scales against ratepayers seeking costing and other data from dominant carriers.

The Notice also contains some useful proposals, particularly the rules governing the protection of confidential information produced in discovery and expanding the role of status conferences in resolving discovery disputes. These modifications would promote both fairness and expedition of the formal complaint process.

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MCI Telecommunications Corporation (MCI), by its undersigned attorneys, submits these comments in response to the Commission's Notice[1/] proposing to modify its formal complaint procedures. MCI welcomes the Commission's attention to the workings of the formal complaint process, especially given the Commission's increasing reliance on that process as a regulatory counterbalance to various policy initiatives reducing its own direct regulation of common carriers. Although the Commission has proposed some useful innovations, particularly the procedures to be followed with regard to confidential information, other suggested changes would have no impact other than to create additional burdens for litigants and Commission staff, resulting in greater, rather than less, delay, and, more importantly, to compromise the usefulness of the complaint process as an effective remedy for injured ratepayers.

1/ Notice of Proposed Rulemaking, FCC 92-59 (released March 12, 1992).

Introduction

MCI fully supports the Commission's goal of facilitating the "expeditious resolution of formal complaints" and would enthusiastically endorse all of the proposals in the Notice to "eliminat[e]" certain "procedures and pleading requirements" if those procedures and requirements had in fact "caused unintended and unnecessary delays"[2/] to a significant degree. Unfortunately, other "factors affecting speed of resolution" recognized by the Commission -- such as "staffing and other resource limitations"[3/] -- overshadow whatever minor delays might be caused by the procedures identified in the Notice. MCI recognizes the constraints imposed by staffing and other resource limitations and is willing to work with the Commission to improve the complaint process in the face of those constraints.

MCI is concerned, however, that this common goal may be threatened by an undue focus on particular aspects of the complaint process that have not, in fact, created much of a problem. For example, requiring pleadings to be filed slightly earlier is not going to suddenly enable the Commission to decide cases significantly more quickly. Most of the delays in the resolution of complaints before the Commission occur after the pleading cycle and the completion of discovery. It is simply not logical to divert a great deal of time and attention to reducing

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2/ Id. at ¶ 1.

3/ Id.

various pleading cycles by five or ten days when the Commission has had fully pleaded formal complaints awaiting decisions for many months.[4/] Moreover, as will be explained below, some of the proposals would have unintended consequences, resulting in greater, not lesser, burdens for the Commission and delaying the resolution of complaint proceedings.

MCI is also concerned that some of the proposed fixes would hinder the just resolution of complaints, and thus the carrying out of the entire range of the Commission's regulatory duties. With the acceleration of the Commission's deregulatory agenda, the formal complaint process has become pivotal to the Commission's performance of its statutory obligations in a wide variety of contexts. The AT&T Price Cap Order[5/] and LEC Price Cap Orders[6/] have greatly reduced the practical utility of the tariff review process as a pre-effective check on the justness

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4/ For example, the record has been "ripe" for decision in MCI Telecommunications Corp. v. American Telephone & Telegraph Co, File No. E-90-28, for nearly a year following the completion of the pleading cycle and all discovery. The Commission's failure to render a decision in that matter is especially unfortunate due to the ongoing marketplace injury complained of therein.

5/ Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, erratum, 4 FCC Rcd 3379 (1989), recons., 6 FCC Rcd 665 (1991), appeal docketed sub nom. American Telephone & Telegraph Co. v. FCC, No. 91-1178 (D.C. Cir. April 15, 1991).

6/ Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786 (1990), recons. denied, 6 FCC Rcd 2637 (1991) (LEC Cap Reconsideration Order), appeal docketed sub nom. Public Service Comm. v. FCC, No. 91-1279 and consolidated cases (D.C. Cir. June 14, 1991).

and reasonableness of dominant carrier rates. As a practical matter, "within-band, below cap" rates will not be suspended, notwithstanding issues as to the reasonableness of such rates.[7/] Similarly, such innovations as the use of the short-form, boiler-plate order allowing tariffs into effect[8/] have also greatly diminished the tariff review process as a pre-effective check on the justness and reasonableness of rates. Another recent policy initiative reducing the Commission's direct regulation of rates is its Interexchange Competition Order, removing a large portion of AT&T's services from any effective regulation.[9/]

7/ See AT&T Price Cap Order, 4 FCC Rcd at 3095-3100, ¶¶ 445-458 (petitions challenging rates within "no-suspension zone" must meet stringent test); LEC Cap Reconsideration Order, 6 FCC Rcd at 2697-98, ¶¶ 133-35 (within-band, below-cap rates presumed lawful). Although the Commission attempted to reassure ratepayers that "[p]etitioners will have an opportunity to rebut the [within-band, below-cap LEC] rates and address issues such as rate churn and discrimination," id. at 2697, ¶ 135, MCI has not seen much evidence of any willingness to respond to such concerns. See, e.g., Annual 1991 Access Tariff Filings: NECA USF and Lifeline Assistance Rates, Trans. No. 452, DA 91-768 (released June 21, 1991), at ¶ 70 (showing of discriminatory rate changes rejected; "[t]he rates questioned by petitioner appear to comply with the price cap rules"); The NYNEX Telephone Companies, Trans. No. 10, DA 91-314 (released Mar. 14, 1991).

8/ See Public Notice 3805 (released April 15, 1986) ("Common Carrier Bureau Announces New Policy Regarding Issuance of Tariff Orders"). This approach was challenged by MCI in September 1988, in an Application For Review following Bureau action taken under delegated authority (In the Matter of AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal No. 1237). It remains unaddressed and unresolved at this time.

9/ Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880 (1991). All of AT&T's outbound business services, except for analog private line service, have been relieved of price cap regulation. Id. at 5893-96, ¶¶ 68-82.

The significance of these policies for this proceeding becomes especially clear when one considers the trade-off provided by the Commission in these orders -- namely an increased reliance on the formal complaint process. In the price cap orders for AT&T and the LECs, it is the complaint process that backstops both programs.[10/] Indeed, the LEC Price Cap Order characterizes the complaint remedy as "an important adjunct"[11/] to the price cap plan and repeatedly relies on that remedy "as part of our plan to ensure just, reasonable and non-discriminatory rates."[12/] Similarly, the Interexchange Competition Order explicitly relies on the complaint process to remedy discrimination that might occur under the diminished rate regulation brought about by that order.[13/]

It is therefore vital that the Commission do nothing to harm the effectiveness of the complaint process or to diminish the due process rights of litigants increasingly forced to rely on that process. Anything less than the availability of a fully effective, just complaint process, given the extent of deregulation by the Commission and its vastly expanded reliance

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10/ See AT&T Price Cap Order, 4 FCC Rcd at 3100, ¶ 458; LEC Price Cap Order, 5 FCC Rcd at 6791, 6805, 6816, 6822, 6824, 6835, 6836, 6858, ¶¶ 36, 153, 241, 291, 293-94, 310, 398 & n.561, 406.

11/ LEC Price Cap Order, 5 FCC Rcd at 6835, ¶ 398.

12/ Id. at 6836, ¶ 406 (emphasis added).

13/ Interexchange Competition Order, 6 FCC Rcd at 5900, 5903, ¶¶ 111 n. 177, 131-32.

on the complaint process to fulfill its statutory responsibilities, would constitute an abdication of those responsibilities, not only as to Sections 206-09 of the Communications Act, but also as to the Commission's duty "to ensure just, reasonable and non-discriminatory rates"[14/] under Sections 201 and 202 of the Act.

Accordingly, justice should be the Commission's paramount goal under the formal complaint rules. Any doubts about proposed changes in those rules should therefore always be resolved in favor of ensuring fairness, both to complainants and defendants. As will be explained below, that principle requires that the Commission not adopt several of the "quick fixes" proposed in the Notice, particularly some of the proposed modifications to the discovery procedures.

Proposed Pleading Modifications

The Commission expresses the hope that "the formal complaint process can be expedited and simplified by modifying filing deadlines, eliminating apparently unnecessary pleading opportunities, and modifying and consolidating the discovery process."[15/] Because the procedural rules are not the cause of the significant delays being experienced in complaint proceedings, however, it is not realistic for the Commission to

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[14/] LEC Price Cap Order, 5 FCC Rcd at 6836, ¶ 406.

[15/] Notice at ¶ 7.

expect any significant results from some of these proposed modifications to the pleading requirements. Moreover, most of the modified filing deadlines proposed in the Notice are unrealistically short and would either have no impact at all on administrative efficiency or would backfire, imposing greater burdens on the Commission.

For example, the proposed reduction in the defendant's time to answer a complaint, from 30 to 20 days,[16/] while not necessarily onerous in every case, could work hardship in complex cases or in cases requiring extensive file searches and interviews in order to ensure an accurate and responsive answer. The complainant has the luxury of preparing the complaint over a protracted period (up to two years under Section 415(a)-(c) of the Act) and thus is in a position to ensure that it could not reasonably be answered in 20 days. The defendant is essentially a "sitting duck." In some cases, relevant information has to be obtained from personnel who have left the company or moved to different locations, and files are not readily accessible. Cutting down on the time that the defendant has to "catch up" with the complainant is not likely to promote the preparation of accurate, complete pleadings. Moreover, the 10 days that are "saved" would hardly make a measurable difference in the

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16/ Id. at ¶ 8.

Commission's ability "to resolve formal complaints in a more timely manner."[17/]

The only tangible impact this proposal is likely to have on the complaint process is the increased burden of more frequent requests for extensions of defendants' time to answer. The Commission could deal with that problem by imposing more stringent standards for extensions. The inevitable result of such a policy, however, would be incomplete or inadequate answers, resulting in more frequent motions to amend answers, thus burdening complainants and Commission staff and delaying the ultimate resolution of complaint proceedings far more than the ten days "saved."

Similarly, requiring defendants' motions for dismissal or for summary judgment to be filed with their answers[18/] is unduly stringent and would be self-defeating. All of the considerations making a 20-day deadline for answering unreasonable also militate against a requirement that a defendant

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17/ Id. at ¶ 7. The one situation where a reduced answer time might be reasonable would be where a formal complaint involved the same parties and allegations as a prior informal complaint, in which case the defendant would presumably already be "up to speed."

18/ Id. at ¶ 11. Some of the proposals in the Notice will be discussed here in a different order from the order of their appearance in the Notice to facilitate orderly discussion and to avoid repetition of some of the points made in these Comments.

file its motion for dismissal or for summary judgment as well on the same day.

Moreover, even if defendant's time to answer were not shortened from the current 30-day period, it still would not be useful to require a motion for summary judgment to be filed by then. The purpose of such a motion is to provide an efficient vehicle for resolution of complaints based on all relevant facts in the record. Imposing a presumption that such motions should be brought prior to discovery thus makes little sense and can only encourage the filing of premature summary judgment motions based on an inadequate record. It would be irrational to discourage the filing of dispositive motions and thus to keep cases going longer than they should. In this respect, the Commission should follow the Federal Rules of Civil Procedure, which place no final deadline on the filing of motions for summary judgment.[19/]

Although the proposed rule would allow the defendant to file a motion for summary judgment after answering if he or she can show that it is based on information discovered after the deadline for filing the answer, such a condition would not cure the problem of premature summary judgment motions but would, in fact, aggravate it. A defendant faced with such a requirement would still feel compelled to file a motion for summary judgment

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[19/] See Fed. R. Civ. P. 56(a), (b).

with the answer, since he or she could not be sure whether discovery would turn up additional facts that might support such a motion later. A careful defendant would have to assume that it might be "now or never" and file for summary judgment with the answer as a matter of course before he was fully ready to do so. Subsequently, he could renew the motion if discovery did turn up additional relevant facts.

Thus, the only tangible impact from this proposal is likely to be a proliferation of premature summary judgment motions served with answers. The Commission should leave well enough alone and allow either party to file for summary judgment at any time. Ironically, the greater freedom of that approach reduces the number of summary judgment motions that are likely to be filed, since parties are not forced prematurely to either move for summary judgment or waive the opportunity to seek such relief forever.

Similarly, imposing unrealistically short deadlines or other rigid conditions on the filing of briefs requested by the Commission[20/] would also be unproductive. Presumably, Commission staff request briefs only in those cases that are too complex to be resolved on the pleadings. It is inconsistent with that purpose to require that such briefs always be submitted simultaneously within 15 days, or, where there has been some

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20/ Notice at ¶ 9.

discovery, 20 days,[21/] to preclude reply briefs except where discovery has been conducted, and to establish page limits. There are bound to be cases in which the Commission would be well served by more thoughtful or longer pleadings, or a different format or schedule. For example, complex legal disputes may require reply briefs just as much as cases involving factual material obtained in discovery. Moreover, simultaneous briefing often results in non-joinder of issues, necessitating additional pleadings. The Enforcement Division staff should therefore continue to have the discretion to tailor briefing schedules and formats to the needs of the cases before them, including alternating, rather than simultaneous, briefing. The Commission ought to be able to trust the judgment of the staff on such matters.

Another pleading proposal that is bound to backfire is the elimination of replies to answers, except where the answer presents affirmative defenses that are factually different from any denials in the answer.[22/] The Commission's goal -- reducing the amount of superfluous rhetoric in pleadings -- is

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[21/] In the Notice, the Commission states that it is proposing to require briefs to be submitted within 15 days, or where there has been some discovery, 20 days, "unless otherwise stated." Id. at ¶ 9. The proposed rules in the Appendix to the Notice effectuating these changes, however, unconditionally require submission of briefs within 15 days, or 20 days, as the case may be, with no exception. See proposed Sections 1.732(b), (c).

[22/] Notice at ¶ 10.

laudable. That would not be the result, however. The problem with this proposal is that it would be impossible in certain situations for the complainant to determine whether an affirmative defense requires a reply, thus exposing him or her to sharp practices. There are situations where it is not clear whether an affirmative defense is merely a paraphrase of a denial or is something not encompassed in any of the defendant's denials. In such a situation, the complainant would be in a quandary, since the failure to reply could ultimately be deemed an admission of a true affirmative defense.

To avoid such dilemmas, the Commission might require the defendant to give notice to the complainant, within a certain period after the filing of its answer, if the complainant has failed to reply to an affirmative defense that defendant believes is separate from its denials and on which defendant intends to rely as an affirmative defense. The complainant could then have a short period in which to file a reply to that affirmative defense. The clumsiness of such a safeguard, however, is a good indication that the proposal to eliminate unnecessary replies simply will not work. Another possible approach might be to provide in the rules that the failure of a complainant to reply to an affirmative defense will not be deemed an admission of that defense. Defendants could test their affirmative defenses by way of motions to dismiss or for summary judgment.

The best way to meet the Commission's goal of eliminating superfluous replies, however, is to leave the current Section 1.726 alone and to rely on defendants' self-interest to solve the problem, to the extent there is a problem. If defendants limit their affirmative defenses to allegations that are truly affirmative defenses, they will reduce complainants' opportunities to buttress weak complaints by adding new allegations in their replies. The Commission might also want to encourage "leaner" pleadings by an explicit confirmation that the defendant bears the burden of proof on any affirmative defense that he or she pleads.

Proposed Discovery Modifications

There are some useful recommendations in the Notice with regard to the discovery process -- particularly the proposed rules providing for the confidential treatment of proprietary information provided in discovery and the proposal to dispense with the filing of answers to interrogatories and documents produced in discovery. The shortened filing times proposed in paragraph 14 of the Notice, however, would in many instances effectively deprive litigants of due process without a measurable impact on the timeliness of the resolution of complaint proceedings.

MCI is especially concerned with some of the discovery proposals in the Notice because of the disproportionate impact

they are likely to have on different classes of litigants. The Commission must not lose sight of the fact that the dominant carriers -- the LECs and AT&T -- are typically the exclusive source of the costing and other accounting data that is vital to the just resolution of complaints brought by ratepayers and smaller competitors regarding the reasonableness of dominant carrier rates. With the steady relaxation of reporting requirements and elimination of cost support requirements under price caps and other deregulatory policies,[23/] discovery has become the only way to obtain much of the accounting data that is in the exclusive possession of the dominant carriers. At the same time, those carriers, as defendants, will not need much discovery of complainants in proceedings concerning dominant carriers' rates. The Commission therefore must not make the mistake of assuming that any procedural alterations are neutral, value-free decisions, and it must be extremely careful not to allow the dominant carriers to use ostensibly neutral procedural modifications as a "Trojan Horse" to capture the complaint process.

[23/] See LEC Price Cap Order, 5 FCC Rcd at 6821-22, ¶¶ 285-95 (eliminating cost support requirements for within-band, within cap tariff filings), id. at 6833-34, ¶¶ 380, 384 (eliminating rate of return reporting on category or rate element level); LEC Cap Reconsideration Order, 6 FCC Rcd at 2697-98, 2730-31, ¶¶ 133-35, 200 (affirming elimination of those requirements); Interexchange Competition Order, 6 FCC Rcd at 5896, ¶ 86 n.143 (eliminating cost support requirements for most AT&T business service tariffs).

MCI is concerned that the various proposals in paragraph 14 of the Notice to shorten the discovery timetable, taken together, would have such an effect. For example, shortening the time within which interrogatories may be served to the period between the due date for the answer and 20 days after such date would unduly restrict the formulation of effective interrogatories without any measurable concomitant increase in speed of resolution. Defendants' preparation of interrogatories directed at complainants' replies would be especially difficult, since all interrogatories must be filed only 10 days after the filing of the reply (i.e., 20 days after the answer is filed).[24/]

Even more unreasonable is the proposal to require any requests for production of documents or additional discovery initiatives to be filed "within this same time frame."[25/] Typically, the need for document requests or depositions is only revealed once the answers to interrogatories are examined. Requiring such requests to be filed simultaneously with interrogatories thus is tantamount to eliminating the other forms of discovery altogether. Such a requirement would seriously compromise the discovery process.[26/]

24/ See 47 C.F.R. § 1.726.

25/ Notice at ¶ 14.

26/ The proposed Section 1.730(c) provides an exception "where the movant demonstrates that the need for such discovery could not, even with due diligence, have been ascertained within this period." That same exception, however, appears in the

(continued...)

The proposal to shorten the time, from 15 days to five, within which to move to compel discovery is in the same vein. Given the time that some discovery motions have been pending before the Commission,[27] it is obvious that the ultimate resolution of complaint proceedings has not been significantly held up by the 10 days that the Commission proposes to subtract

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[26] (...continued)
current version of Section 1.730(c), which allows such motions to be brought up to 30 days after responses to interrogatories are received. MCI is concerned that, if the time to move for additional discovery is shortened as proposed, the quoted exception would be more narrowly interpreted to exclude other forms of discovery in most cases. Such an interpretation might arise from the fact that it could be reasonably argued in every case that the need for additional discovery could not have been ascertained until responses to interrogatories were received. The Commission might take the view that, if this exception typically allowed a longer time to seek additional discovery, the exception would threaten to swallow the rule change shortening the period in which to move for additional discovery. So as not to render the rule change a nullity, the Commission might apply the exception more narrowly, thus disallowing additional discovery in some instances where it should be allowed.

The Commission might take care of this problem by explicitly recognizing in its order in this proceeding that in almost every case, it will be likely that the need for additional discovery could not be ascertained within the time allowed for filing initial interrogatories. Having said that, however, it would make little sense for the Commission to go through the useless exercise of shortening the period as proposed.

[27] See, e.g., MCI's pending motion to compel discovery filed in MCI Telecommunications Corp v. Pacific Bell Tel. Co, File No. E-88-46, on May 17, 1990. Even subtracting the time that the liability order in that case was on appeal in Pacific Bell v. FCC, No. 90-9551 (10th Cir., appeal docketed July 26, 1990) (originally docketed as No. 90-1391 in D.C. Cir.), that appeal was dismissed by an Order and Judgment filed December 13, 1991, and the mandate was issued on January 27, 1992. Had MCI's time in which to move to compel discovery been shortened by 10 days, its motion still would have been pending for over two months prior to the filing of Pacific Bell's petition for review and for the past three months since issuance of the mandate.

from the time allowed for motions to compel. Requiring such motions to be prepared within five days -- if not less, due to the worsening mail service -- is one of the more egregious "hurry up and wait" proposals in the Notice. Such an unrealistic time frame will leave no time for an intelligent analysis of interrogatory responses or the effective framing of issues in a motion to compel.

Shortening the time to respond to interrogatories and document requests from 30 to 20 days, although a lesser problem, is also unduly stringent and would accomplish nothing. As with the other deadline shortening proposals in the Notice, the ten days supposedly "saved" by the earlier response deadline would make no difference in the timing of the Commission's ultimate resolution of the proceeding, while the inadequate responses to discovery that would be encouraged thereby would only serve to prolong complaint proceedings.

Although the Commission's ostensible purpose in making these proposals is to refine the discovery process, the practical effect of several of these proposals -- in the increasingly deregulatory context in which the complaint process will be functioning -- will only be to tip the scales in complaint proceedings in favor of dominant carriers defending complaints against their rates. Effectively eliminating any discovery beyond the initial interrogatories and cutting the time within

which to file motions to compel discovery to the point where there is almost no time to analyze responses to interrogatories or document requests before filing a motion to compel are good examples of what could easily become a program to eliminate discovery by ratepayers or smaller competitors of dominant carrier accounting information and other complex data.

These examples take on an especially sinister cast in light of the proposal, in footnote 9 of the Notice, to eliminate discovery altogether "absent an affirmative order by the staff." Nothing would eviscerate the ratepayer remedies under Sections 206-09 of the Act more completely than a presumption against any discovery of dominant carrier cost and other data that has become increasingly shielded from public view. Now that the formal complaint remedy has become so central to the realization of the broad range of the Commission's statutory obligations, discovery -- and any other procedures necessary to make the complaint remedy effective -- should be made easier and more wide-ranging, not narrower and more difficult. It would be arbitrary and capricious for the Commission to take any steps that diminish the effectiveness of the complaint remedy after having taken so many deregulatory actions in reliance on the continuation of an effective complaint remedy.

As mentioned previously, the Notice also contains some very useful proposals relating to discovery. The one proposal in the

Notice that really will have a salutary effect on the resolution of formal complaints (and one that the dominant carriers will no doubt oppose strenuously) is the procedure relating to proprietary data.[28/] Parties are now forced to waste countless hours negotiating the terms of confidentiality agreements in order to obtain discovery of confidential information. The proposed Section 1.731 (mislabelled Section 1.730), dealing with confidential information produced through discovery, would provide sufficient protection for confidential information while eliminating the endless wrangling over confidentiality agreements.

It is also probably a useful idea to put off damages discovery until after liability is found, with an alternative dispute resolution mechanism prior to the damages phase.[29/] Once liability is found, the existence and amount of damages ought to be issues that lend themselves to mediation or arbitration. The Commission should make it clear, however, that discovery relating to liability should be permitted to go ahead, even if such discovery might also reveal or relate to damages.

Another proposal that would actually accelerate the resolution of complaints is the use of status conferences to

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[28/] Notice at ¶ 16.

[29/] Id. at ¶ 13.

resolve all objections to discovery.[30/] The dialogue that is possible at a conference would enable the Commission staff to ask whatever questions might have been raised by discovery motion papers that needed to be resolved before ruling on the objections and/or motions to compel. Ruling on discovery at a status conference would thus be quicker than resolving such issues solely on the basis of motion papers. The one alteration that MCI suggests with regard to this proposal is that the Commission staff should have the discretion, at such a status conference, to allow a longer time than 10 days to respond to discovery, once objections thereto are overruled or a motion to compel is granted at the conference.[31/]

Finally, the proposal to eliminate relevance objections to discovery[32/] is well-intentioned, but it goes too far and needs considerable analysis and elaboration before a useful rule can be framed. First, the Commission cannot literally intend to "preclude" relevance objections. It would clearly violate due process to prohibit a party from making relevance arguments in any aspect of a formal complaint proceeding, including discovery.

[30/] Id. at ¶ 14.

[31/] MCI also notes that the proposed Sections 1.733(a)(5) and 1.733(c) do not explicitly refer to motions to compel discovery. Any and all issues relating to discovery should be resolved at status conferences, irrespective of their procedural posture.

[32/] Notice at ¶ 15.

Second, the Commission needs to refine the ramifications of a refusal to respond to discovery. It is not clear what is meant by the proposal that "refusal to answer an interrogatory or an objection based on relevance would be deemed an admission of allegations contained in the interrogatory." Interrogatories do not contain "allegations;" they simply pose questions that are designed to elicit facts. It would be impossible to regulate just what should be deemed admitted by a refusal to respond or by an objection to a particular interrogatory. Such a rule would invite abuse, since the more objectionable the question -- e.g., "when did you stop beating your wife?" -- the worse the implied admission resulting from an objection. The Commission would soon become bogged down in endless disputes over exactly what had been admitted by virtue of a failure to respond to discovery, a task much more complex than simply resolving the relevance objection itself.

It is also not clear what is meant by the proposal that "such an admission would only be relevant for the purposes of resolving the complaint." If that "admission" became the basis for the Commission's decision resolving the complaint, the Commission would then be faced with the task of determining the precedential or estoppel effect of the decision. Could a decision based on a hypothetical "fact," assumed only for that proceeding, be given any such effect? Should the assumed "fact" bind the party that refused to respond to discovery in another